

APPEAL NO. 040615  
FILED MAY 6, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 1, 2004. The hearing officer decided that: (1) the appellant/cross-respondent (claimant) had disability resulting from the compensable injury of \_\_\_\_\_, beginning January 29, 2003, and continuing through June 24, 2003; and (2) the respondent/cross-appellant (carrier) is not entitled to suspend the claimant's income benefits to recoup an overpayment of temporary income benefits (TIBs) in the amount of \$4,341.30. The claimant appeals the hearing officer's disability determination on sufficiency of the evidence grounds, asserting that disability continued through October 28, 2003. The carrier did not file a response. The carrier cross-appeals the hearing officer's decision, requesting a decision that it is "entitled to recoup an overpayment of income benefits." The claimant responded, stating that the carrier may recoup the overpayment at a rate of no more than 10% of the claimant's weekly impairment income benefits (IIBs). The claimant's brief on the issue of recoupment was not timely filed as an appeal, and it will not be considered as such. Section 410.202.

**DECISION**

Affirmed on other grounds, as modified.

**DISABILITY**

The hearing officer did not err in determining that the claimant had disability from January 29, 2003, through June 24, 2003. The period of disability involved a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The hearing officer considered the evidence and essentially found that the claimant did not have disability from June 25, 2003, through October 28, 2003. In view of the evidence presented, we cannot conclude that the hearing officer's determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

**RECOUPMENT**

The claimant sustained a compensable injury on \_\_\_\_\_. The carrier paid the claimant TIBs at a rate of \$537.00 per week for 29 weeks. The parties stipulated that the claimant was overpaid TIBs in the amount of \$4,341.30, the difference between the maximum TIBs rate of \$537.00 per week and the correct TIBs rate of \$387.30 per week. On August 22, 2003, the carrier ceased the payment of

income benefits. The carrier's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) indicates that the payments ceased, due to the overpayment of TIBs and because "the claimant is no longer disabled."

The claimant was subsequently examined by a designated doctor appointed by the Texas Workers' Compensation Commission (Commission). The designated doctor certified the claimant at maximum medical improvement (MMI) on October 28, 2003, with a 3% impairment rating (IR). The record indicates, however, that the issues of MMI and IR have not been resolved.

The following issue was certified in the Benefit Review Conference Report: Is the carrier entitled to suspend the claimant's income benefits to recoup the previous overpayment of \$4,341.30? The claimant argued that the carrier was not entitled to recoup the overpayment from future TIBs payments, if any, and that the issue of recoupment from IIBs was premature, as the claimant's IR had not been determined. The carrier argued that it was entitled to recoupment from the claimant's future TIBs and IIBs. Given the disability determination above, the hearing officer determined that "no additional [TIBs] are owed as of the date of this hearing." The hearing officer, then, applied Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.1(e) (Rule 128.1(e)) and found that the carrier was not entitled to suspend the claimant's income benefits because it did not "attempt to enter into a written agreement with the claimant or, if unable to do so, contact the [C]ommission." Notwithstanding, the hearing officer stated, "The [c]arrier is entitled to recoup at the rate of 10% or 25%, depending on whether attorney's fees are due [c]laimant's [a]ttorney, from [IIBs]," pursuant to Rule 128.1(e)(2)(A) and (B).

Given our affirmance of the hearing officer's disability determination and in the absence of a resolution of MMI/IR, it has not been shown that the claimant is currently owed income benefits. For this reason, we affirm the hearing officer's decision that the carrier is not entitled to suspend the claimant's income benefits to recoup the overpayment of \$4,341.30. Additionally, we strike the hearing officer's statement that the carrier is entitled to recoup the overpayment at the rate of 10% or 25%, as premature.

The decision and order of the hearing officer is affirmed on other grounds, as modified.

The true corporate name of the insurance carrier is **TRINITY UNIVERSAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RONALD I. HENRY  
10000 NORTH CENTRAL EXPRESSWAY  
DALLAS, TEXAS 75230.**

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Edward Vilano  
Appeals Judge

CONCUR:

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Veronica L. Ruberto  
Appeals Judge

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Margaret L. Turner  
Appeals Judge